IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

NEVRO CORP.,)
Plaintiff,) C.A. No. 19-325-CFC
i iaiiiiii,) JURY TRIAL DEMANDED
v.)
·) PUBLIC VERSION
STIMWAVE TECHNOLOGIES, INC.,)
)
Defendant.)

LETTER TO THE HONORABLE COLM F. CONNOLLY FROM BINDU A. PALAPURA

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May 21, 2019

VIA ELECTRONIC FILING

PUBLIC VERSION May 28, 2019

The Honorable Colm F. Connolly United States District Court for the District of Delaware 844 North King Street Wilmington DE 19801

Re: Nevro Corp. v. Stimwave Technologies, Inc., C.A. No. 19-325-CFC

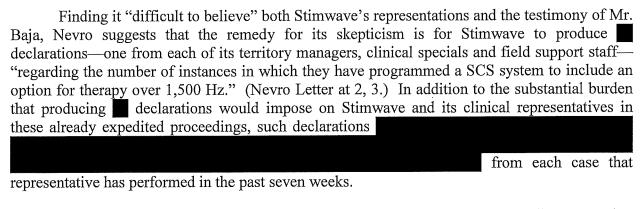
Dear Judge Connolly:

Stimwave submits this letter brief in response to Nevro's May 20, 2019 letter. (D.I. 61.)

Stimwave Has Provided All Available Information About Programming Above 1,500 Hz

Stimwave's response to Nevro's Interrogatory No. 2 and Sales, Northeast, and Rule 30(b)(6) witness Michael Baja's testing programming of the Stimwave Freedom SCS System is compared to the Stimwave Freedom SCS System SCS Syst	mony both confirm that once
representative	
Nevro refuses to accept this fact and dema to obtain over declarations and modify the practices it employs business. This is both unworkable and inconsistent with the Discovery. Thus, Nevro's motion should be denied.	s in the ordinary course of its
To the extent Stimwave has evidence showing the program the United States at 10,000 Hz outside of a clinical trial, it has pro 1 at 1.) Stimwave produced a list of all SCS permanent imp scheduled to be performed between March 29, 2019—the day Sti SCS treatment with frequencies up to 10,000 Hz—and April 30, This list includes the name of each Stimwave sales representative re (Id.) Stimwave then collected and produced all available	duced that evidence. (Exhibit lant procedures performed or mwave received approval for 2019. (D.I. 61-1, Exhibit 8.)
at 1.)	(Exhibit 1 61-1, Exhibit 4 at 77:4–25.)

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Stimwave has tried to ascertain any reliable evidence on this issue, including contacting its sales representatives. As Stimwave previously explained to Nevro, however, without

Nevro also suggests that each of these representatives should be required to "keep logs of such activity going forward." (Nevro Letter at 3.) This, too, would place a substantial burden on Stimwave and its clinical representatives and would require

—a standard not

once mentioned in Nevro's letter—is specifically excluded by paragraph 1(c)(i) of the Delaware Default Standard for Discovery:

Absent a showing of good cause by the requesting party, the parties shall not be required to modify, on a going-forward basis, the procedures used by them in the ordinary course of business to back up and archive data; provided, however, that the parties shall preserve the non-duplicative discoverable information currently in their possession, custody or control.

Nevro has not shown good cause for its unreasonable request.

Stimwave Has Provided Ample Discovery on Its Ability to Satisfy a Judgment

Stimwave has produced to Nevro extensive financial information, including its audited yearly financial summaries through 2017, the most final version of its 2018 financials, the current version of its Q1 2019 financials, and its 5-year pro forma analysis. Stimwave also produced Mr. Baja as a Rule 30(b)(6) witness "regarding Stimwave's present, and forecasted revenue, cash reserves, and ability to obtain financing." (D.I. 61-1, Exhibit 2 at 10.)

Now, without even attempting to identify the amount of any such potential judgment, Nevro asks this Court to compel Stimwave to provide Rule 30(b)(6) testimony regarding Stimwave's "ability to satisfy a money judgment in this case." (*Id.*) This is not a well-defined topic for a Rule 30(b)(6) witness, and preparing a witness on this topic without information regarding the amount of any such judgment is not feasible.

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Stimwave also disagrees with Nevro's characterization of Mr. Baja's Rule 30(b)(6) testimony regarding Stimwave's finances and financial conditions. Mr. Baja was well-prepared to testify as to these topics, including how information in each financial statement was calculated. But rather than ask Mr. Baja about the contents of Stimwave's financial statements or its 5-year pro forma analysis, Nevro instead chose to question Mr. Baja about choice excerpts from a Stimwave board meeting agenda. (D.I. 61-1, Exhibit 4 at 289:22–290:6.) That Mr. Baja could not identify the basis for such statements does not mean that he was not prepared to discuss the topics for which he was designated.

In an effort to compromise on the issue, in an off-the-record conversation at Mr. Baja's deposition, Stimwave offered to provide expedited written responses to questions Nevro may have about the authenticity of Stimwave's financial statements or the information contained therein. Additionally, although Stimwave continues to maintain that Mr. Baja was well-prepared to testify on the issues for which he was designated, Stimwave will agree to designate a Rule 30(b)(6) witness to testify as to the contents of Stimwave's financial statements, including SW_00008338 (2015 Financial Statement), SW_00008323 (2016 Financial Statement), SW_00008298 (2017 Financial Statement), SW_00025955 (Q1 2019 Financial Statement), and SW_00016114 (5-year pro forma).

In view of Stimwave's willingness to compromise on this issue, Nevro's motion to compel additional Rule 30(b)(6) testimony as to Topic No. 11 should be denied.

<u>Conclusion</u>. For the reasons set forth above, Stimwave respectfully requests that the Court deny Nevro's motion to compel.

Respectfully,

/s/ Bindu A. Palapura

Bindu A. Palapura

BAP:msb/6220432/49070

Enclosure

cc: Clerk of Court (by hand delivery)(w/encl.)

Counsel of Record (by electronic mail)(w/encl.)